Supreme Court, U.S.
FILED
MAY 1 1998
CLERK

No. 97-1579

In the
Supreme Court of the United States
October Term, 1997

ZENITH/KREMER WASTE SYSTEMS, INC. AND UNITED WASTE SYSTEMS, INC.,

Petitioners,

v.

WESTERN LAKE SUPERIOR SANITARY DISTRICT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Noteworthy in Western Lake Superior Sanitary District's (WLSSD) response is that the discriminatory purpose of the fee/subsidy scheme is not disputed–WLSSD acknowledges its blatant attempt to control all of the garbage generated within its boundaries. To accomplish that purpose, WLSSD merely replaced regulatory flow control with economic flow control. A substantial part of the waste management fee–which WLSSD admits is a tax–is indisputably used to subsidize the operations of the incinerator. Brief of Respondent at 5.[1] And WLSSD does not deny that the overall purpose of the subsidy was to finance the operation of its facility.

Three points in WLSSD's statement of the case merit direct response. First, WLSSD asserts there is a critical distinction about the way in which the waste management fee was assessed. WLSSD pretends that the fee is a volume charge on generators that haulers simply collected. Because haulers were not liable if the generators refused to pay the fee, WLSSD argues, the haulers did not pay the tax. Brief of Respondent at 4. But WLSSD ignores the fact that if a hauler wants to export waste, the generator would have to be offered a price that matched haulers who used the incinerator. To do so, a hauler would have to absorb any additional costs, such as transportation, that would be involved in exporting waste. WLSSD also ignores that while generators had to pay the tax in the first instance, WLSSD reserved the right to exercise "other remedies" against haulers who did not undertake "reasonable [collection] efforts." Ordinance § 3, subs. 1.B and 9. (Resp. App. 20, 24.)

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[1] The $7.00 per ton figure is simply the uncontested minimum amount of the subsidy. (App. 5, 17.) In footnote seven of its brief WLSSD asserts that certain overhead costs were not directly related to operating its facility. But as indirect costs, these overhead charges supported the facility, which the district implicitly concedes, and thus, also were part of the total subsidy.

This assertion is also contrary to what the district court found below. In its decision, the trial court found that "[t]o the extent the waste is nonetheless hauled outstate it pays a toll, that part of the waste generation fee going to pay WLSSD plant debt ...." (App. 45.) The Minnesota Court of Appeals affirmed this finding, holding that at least to the extent that the fee was used to pay debt service, part of the charge was imposed only "on haulers to out-of-state landfills." (App. 20.) The Minnesota Supreme Court, while reversing the court of appeals, did not dispute this finding about the burden on interstate commerce.

WLSSD also proclaims that in 1997 the waste management fee/subsidy was replaced with a subsidy funded out of ad valorem property taxes, assessed by the district. (App. 97.) That fact is of no moment, except to illustrate WLSSD's own concern about the constitutionality of its fee/subsidy scheme. If the fee/subsidy scheme is unconstitutional, petitioners were hurt and Zenith/Kremer would have a right to seek a refund of millions of dollars under state law because unconstitutional fees are by definition unreasonable. Section 1983 damages under federal law are also available. Moreover, WLSSD does not deny that under the decision below, if left standing, the district could revert back to the waste management fee.[2]

Finally, WLSSD notes that petitioner Zenith/Kremer has so far unsuccessfully sought a special use permit to construct a solid waste transfer station in the neighboring city of Superior, Wisconsin. That facility would be used to transfer solid waste from a local collection trucks to long-haul vehicles for shipment to United's Ontonagon, Michigan landfill. While the permit has been denied initially, that fact does not constitute a legal excuse

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[2] The existence of a remedy against WLSSD if the decision is overturned and the possibility that the district could reenact the ordinance keep this case from becoming moot. *See Calderon v. Moore*, 518 U.S. 149, 116 S. Ct. 2066, 2067 (1996); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

for unconstitutional conduct, nor is it a superseding cause to the destruction of interstate commerce in waste disposal services within WLSSD. There is nothing in the record below to show that the transfer station had to be in place for petitioners to ship solid waste out-of-state. What the record does show, which WLSSD does not dispute, is that its fee/subsidy scheme made it uneconomic to ship solid waste out of the district in the first instance. That undisputed fact is central to the issues petitioners raise.

ARGUMENT

I. WLSSD arguments to fit its fee/subsidy scheme within the precedents of this Court are unavailing.

The district seeks to avoid review by arguing that the decision below comports with *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994) and *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). These arguments fail because this pair of decisions fully vitiates the reasoning and holding of the Minnesota Supreme Court.

A. WLSSD has failed to show that the decision below complies with *West Lynn's* Commerce Clause principles.

WLSSD attempts to distinguish *West Lynn* because its waste management fee was imposed solely upon solid waste generators within the district. Consequently, unlike *West Lynn*, no out-of-state businesses directly paid the fee. Brief of Respondent at 8. Additionally, WLSSD insists that waste management fee revenues are used to fund a variety of programs and services unrelated to the incinerator. These undertakings supposedly benefit all waste generators within the district. *Id.* at 8-9. Likewise, WLSSD maintains that the use of solid waste to

incinerate sewage sludge is a public good, even though other fuels could have accomplished the same disposal. (App. 86.)

The flaw in WLSSD's argument is the clearly established Commerce Clause principle that prohibits a state or a political subdivision from isolating itself from a "problem common to the several States by raising barriers to the free flow of interstate trade." *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 339-40 (1992). Having lost regulatory flow control to *Carbone*, WLSSD resorted to economic coercion to achieve the same end. The dispositive Commerce Clause issue is the effect that a local taxing scheme has on interstate commerce. If the arrangement favors local services and functions like a tariff to neutralize advantages belonging to out-of-state providers, it violates the Commerce Clause. *West Lynn*, 512 U.S. at 196.

WLSSD's scheme is not a facially neutral tax imposed on a purely local activity. The admitted purpose of the fee/subsidy was discrimination against interstate commerce. (App. 20-21, 40.) The arrangement creates the functional equivalent of a tariff that renders solid waste exportation more expensive. As the state district court and court of appeals recognized, haulers who wanted to ship solid waste out of the district had to pay twice – first the subsidy for WLSSD's facility, and again for the tipping fee charged by the out-of-state facility. From the perspective of a generator, the fee was like a tariff on imported waste disposal services, because the generator who used an out-of-state facility would pay the tax and yet received no benefit from the subsidy. The economic effect is obvious; the rational waste generator would always select the cheapest disposal services, here, that provided by WLSSD. With its taxing power, WLSSD erected a wall around its boundaries, a result proscribed by the Commerce Clause principles articulated in *West Lynn*.

Likewise, WLSSD's fee/subsidy scheme is not saved by *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). The district argues that *South-Central Timber* suggests that the state could have "directly subsidized the timber-

processing industry" in order to provide a purchaser of state-owned timber the option of processing that timber locally or out-of-state. *Id.* at 95. That observation, however, does not save WLSSD's fee/subsidy scheme from constitutional infirmity. Rather, *South-Central Timber* underscores one of the core issues in this case–the parameters for using state subsidies to favor local operations.

Likewise, WLSSD can derive no benefit from the Court's decision in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). That coal severance tax case applied the taxing principles established in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). *See Commonwealth Edison*, 453 U.S. at 625-26 (analyzing tax under the fourth prong of *Complete Auto Transit* test). As discussed below, a state's basic right to require interstate commerce to pay its fair share of taxes is not at issue here.

B. WLSSD derives no benefit from this Court's decision in *Carbone*.

WLSSD decrees that the decision below is within the facts and holding of *Carbone* and this Court's dicta about alternative financing means for a town's waste transfer station. Brief of Respondent at 11. WLSSD distinguishes its fee ordinance from the flow control ordinance struck down in *Carbone*, with its asserted difference that the fee/subsidy scheme did not require waste to be processed at WLSSD's incinerator. According to WLSSD, it simply followed a suggestion from *Carbone* about subsidizing its facility to give it a "'advantage over rival business from out-of-state.'" See Brief of Respondent at 12 (quoting *Carbone*, 511 U.S. at 394).

Try as it might, WLSSD fails to distinguish *Carbone*. WLSSD's fee/subsidy scheme was adopted because its flow control ordinance, which literally criminalized competition, was declared invalid under *Carbone*. (App. 81-85.) And the

fee/subsidy scheme was intended to and did hoard waste within the district. Moreover, while *Carbone* rejected the financial need the town had advanced, the Minnesota Supreme Court accepted this very same financial justification for the decision below. WLSSD now backs away from that justification and the rationale of the decision below in relying on the dicta in *Carbone* regarding subsidies.

What WLSSD's brief best illustrates is the need for resolution about how subsidies can be used to favor local facilities that compete with interstate commerce. *Carbone* mentioned such subsidization as a possible nondiscriminatory alternative, but whether and how far subsidies can be used to accomplish that end clearly is unresolved. WLSSD has failed to rebut what petitioners and prospective amici have argued regarding the need to address that question, particularly for the solid waste industry.

II. Arguments about this Court's tax precedents fail to address the fatal flaw of WLSSD's scheme: the subsidies do not come from general revenues.

WLSSD argues at length about consistency with this Court's precedents. Brief of Respondent at 14-21. These arguments are unavailing because they rely either on irrelevant authority or simply emphasize why review is necessary.

WLSSD first relies upon state tax cases to suggest that a state may permissibly subsidize infrastructure or services. Brief of Respondent at 16. But the *Complete Auto Transit* line of cases is wholly irrelevant to the issues in this case. Those precedents stand for the now unremarkable proposition that "interstate commerce may be required to pay its fair share of state taxes." *D. H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 31 (1988). What the Court established in *Complete Auto Transit* was a four-part test to ensure that the burden on interstate commerce was nondiscriminatory and fairly

apportioned to the activities and the benefits received from the taxing jurisdiction. *Complete Auto Transit*, 430 U.S. at 287. This Court has never condoned levying a tax and using the revenues derived from that tax to subsidize a local activity in direct competition with out-of-state providers of that same service. The *West Lynn* analysis of the milk tax/subsidy scheme would have been completely different if the *Complete Auto Transit* test had controlled.

Stretching further, WLSSD invokes user fee cases to maintain that the incinerator can be subsidized from many sources, not just general taxes. That line of cases, however, merely define the limits on user fees, requiring that user fees be based on a reasonable approximation of the cost of operating the facilities. *See Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 720 (1972). The record in this case shows that the user fee, WLSSD's tipping fee, is insufficient to pay for operating the incinerator. (App. 5, 17.) In any event, WLSSD's reliance on a user fee analysis is inexplicable, because it concedes that its "waste management fee was a tax rather than a user fee ...." Brief of Respondent at 17 n.13.

If general tax revenues must be used to subsidize government services that happen also to be available from a private sector source, then WLSSD insists that if special-purpose political subdivisions provide such services, they will be able to do so only through user charges. Hyperbole aside, this argument ignores the very point established in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, ___ U.S. ___, 117 S. Ct. 1590 (1997) and *West Lynn*. Discrimination against interstate commerce may not be used to finance local activities, no matter how laudatory.

In its last argument, the district asserts, without benefit of legal authority, that the waste management fee was a general tax. Principally, political participation is said to exist because WLSSD was created by an elective body and the waste

management fee was imposed after notice and public hearings. Brief of Respondent at 20. In any case, WLSSD asserts that the fee was being imposed on the same citizens who would pay a property tax to subsidize incinerator operations.

This argument does no more than join the issue about whether the waste management fee was a general tax for Commerce Clause purposes. WLSSD does not deny that it is an unelected body and that its revenues are self-contained and isolated from the general appropriations process. And there is a distinction between the fee levied on waste generators and a tax on property owners: a generator may not necessarily be a taxpayer; a taxpayer who pays substantial property taxes may generate only small quantities of waste. The broader issue is the requirement that a taxing entity must subject its appropriations to the safeguards of the political process. It is fairly debatable whether the appropriations of a financially self-contained and unelected district, even if it levies property taxes rather than some other form of tax, has sufficient political safeguards to ensure that its taxes are not being used discriminatorily. At least that question should be resolved here.

CONCLUSION

In its final argument, WLSSD asserts again that this case is controlled by *Complete Auto Transit* and does not present the subsidy issue left open in *Camps Newfound*. Brief of Respondent at 22-24. But this case unequivocally raises the subsidy question unanswered by *West Lynn* and *Camps Newfound*. Very simply, the district used its taxing authority to subsidize an activity with the purpose and effect of discriminating against interstate commerce. That fact drives this case, but how that subsidization takes place is the question this Court should now resolve.

Accordingly, petitioners request that the Court grant the petition for certiorari to review the decision of the Minnesota Supreme Court.

Respectfully submitted,

Dated: April 30, 1998

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